

**DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224**

OFFICE OF  
CHIEF COUNSEL

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DL-100442-96

June 16, 1998

**MEMORANDUM FOR DIRECTOR, 6103/PRIVACY OPERATIONS**

**FROM:** Chief, Branch 4 (Disclosure Litigation)

**SUBJECT:** PBGC Disclosure of Return Information to Contractors

This is a follow-up memorandum regarding the issue of disclosures by the Pension Benefit Guaranty Corporation (PBGC) to contractors. In a December 16, 1994, letter to the IRS, the PBGC asserted that I.R.C. § 6103(l)(2) and regulations thereunder permit its disclosure of return information to its contractors wherever necessary to administer Title IV of ERISA. As we previously stated in our February 15, 1995, memorandum to the Assistant Commissioner (Exempt Organizations and Employee Plans), we disagree with the PBGC's assertion. We believe that disclosures of return information to PBGC contractors are limited to those associated with litigation related activities in the enforcement of Title IV of ERISA. Treas. Reg. § 301.6103(l)(2)-3(c)(2)(ii)(A).<sup>1</sup>

At a meeting on February 8, 1996, PBGC and IRS officials discussed the two differing interpretations of the Treasury regulations at issue. While neither agency's representatives were willing to accede to the other's interpretation, the possibility was raised that the actual use of contractors by the PBGC may, in fact, conform to the IRS's view of what was permitted under the applicable regulations.<sup>2</sup>

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<sup>1</sup> The regulation permits disclosures where necessary to "properly obtain the services of persons having special knowledge or technical skills."

<sup>2</sup> With respect to the February 8 discussion about the scope of the Treasury regulations, the letter stated that PBGC believed "a general understanding was reached that PBGC's interpretation was correct."

In an April 5, 1996, letter, the PBGC detailed its use of return information and the extent to which its contractors have access to such information.

### Conclusion

Based on the representations by the PBGC in its April 5, 1996, letter, we believe that the disclosures to PBGC contractors have been within our interpretation of the applicable regulations governing such disclosures. As indicated below, we also note that some additional recordkeeping and safeguard procedures may be warranted with respect to these disclosures.

### Analysis

As we explained in our February 15, 1995, memorandum, I.R.C. § 6103(l)(2) and Treas. Reg. § 301.6103(l)(2)-3(c)(2)(ii)(A) permit the PBGC to disclose return information to contractors only in furtherance of litigation related activities in the enforcement of Title IV of ERISA and not in the administration of that statute generally. Our legal opinion on this issue is amply supported by the origin of the regulation as well as contemporaneous memoranda in the Treasury Decision file specifically addressing the issue.

In our February 8, 1996, meeting, the PBGC explained that judicial enforcement of Title IV cases by the PBGC depends in large part upon the administrative record, which is developed by the PBGC before a final decision is made to litigate the case. It is in building of this administrative record, the PBGC explained, that it may need to use outside experts and consultants. Once the decision is made to litigate a case, the PBGC cannot go back and further buttress the administrative record in that case.

While it was unable to provide exact figures, the PBGC represented, in its April 5, 1996, letter, that the disclosure of return information to contractors "occurs in few, if any, Title IV enforcement cases" and that the number of cases in which contractors would even have had access to return information was "extremely small." The PBGC further stated:

In the handful of cases in which we are aware that PBGC redisclosed tax information to contractors, the plans had large underfunding and posed a substantial financial risk to PBGC. These cases also tend to pose the greatest likelihood of litigation. It is particularly important in such cases for PBGC to not only utilize consultants, but to utilize them at an early stage, prior to plan termination and initiation of litigation. While PBGC's consultants provide expert services both prior to and during litigation, it is the services they provide during the administrative phase of PBGC's enforcement proceedings that is [sic] most essential to our mission. This pre-litigation input enables PBGC to make the necessary statutory determinations required to maintain enforcement actions against plan

sponsors or controlled group members under Title IV of ERISA. Further, as noted previously, under the Administrative Procedure Act, PBGC's success in litigation depends upon the adequacy of the administrative record.

We believe that in the context of PBGC's enforcement process, the PBGC's actual practice with respect to disclosing return information to contractors coincides with our interpretation of Treas. Reg. § 301.6103(l)(2)-3(c)(2)(ii). In particular, the fact that disclosures to contractors have been limited to those cases having "the greatest likelihood of litigation" is consistent with the litigation-related focus and intent of the regulation. In our view, the regulation, which permits disclosures in preparation for litigation, must be interpreted to allow for disclosures in cases where subsequent litigation is likely but not necessarily certain.

The PBGC's April 5, 1996, letter does raise some concern, however, with respect to the PBGC's apparent lack of precise recordkeeping as to its disclosures to contractors. I.R.C. § 6103(p)(4) requires certain Federal agencies, including the PBGC, to maintain a record of any disclosures of return information. The PBGC apparently has not maintained this type of record and should begin doing so forthwith. We contemplate that the PBGC will be referred to your office for assistance and oversight with respect to compliance with this requirement.

Please contact Douglas Gibleon at 622-4570 with any further questions on this matter.

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JOSEPH J. URBAN

cc: Director, Employee Plans Division OP:E:EP  
Director, Safeguards/Tax Checks OP:EX:GLD:ST